SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

10/15/2002 CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES P. M. Espinoza
Deputy

LC 2002-000029

FILED: _____

STATE OF ARIZONA WEBSTER CRAIG JONES

v.

ADAM JOHN WINTER THEODORE A AGNICK

FINANCIAL SERVICES-CCC
MESA CITY COURT
REMAND DESK CR-CCC

MINUTE ENTRY

MESA CITY COURT

Cit. No. #747479; 2001002300

Charge: 3. DRIVING OR IN ACTUAL PHYSICAL CONTROL OF MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF LIQUOR

4. HAVING A BAC .10 OR ABOVE WITHIN 2 HOURS OF DRIVING

DOB: 07/09/76

DOC: 12/31/00; 12/30/00

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

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This Court heard oral argument in this case on August 14, 2002, and ordered counsel to submit supplemental memoranda to the court on the issue of whether the Extreme DUI charge and the charge in A.R.S. Section 28-1381(A)(2) was multiplicitous. This Court has reviewed all of the memoranda submitted. This decision is made within 30 days as required by Rule 9.8, Maricopa County Superior Court Local Rules of Practice.

Appellant, Adam John Winter, was charged with the following crimes: (1) Speed Not Reasonable and Prudent, a civil traffic matter in violation of A.R.S. Section 28-701(A); (2) Improper Left Turn, a civil traffic matter in violation of A.R.S. Section 28-751.2; (3) Driving While Under the Influence of Intoxicating Liquor, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(1); (4) Having a Blood Alcohol Content in Excess of .10, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(2); and (5) Extreme DUI, a class 1 misdemeanor, in violation of A.R.S. Section 28-1382. These crimes were alleged to have occurred on December 31, 2000. The parties waived their rights to a jury trial and Appellant was found guilty and responsible after a trial to the court. Appellant has filed a timely Notice of Appeal in this case.

This Court has considered the issues raised by Appellant on appeal and found that they have no merit. However, having reviewed the supplemental memoranda submitted by the parties, this Court is convinced that the trial court erred in entering judgment for the charge in Count 4 [Having a Blood Alcohol Content of .10 or Greater within 2 hours of Driving, in violation of A.R.S. Section 28-1381(A)(2)]. The issue of the multiplicitous nature of the charges in Counts 4 and 5 (Driving with Blood Alcohol Greater than .10 and Extreme DUI) is a question of law which must be reviewed *de novo* by this Court.[1]

The double jeopardy clauses in the United States and Arizona Constitutions prohibit conviction for an offense and its

[1] *State v. Welch*, 198 Ariz. 554, 12 P.3d 229 (App. 2000).

lesser included offense.[2] Appellant contends that the crime of Driving with a Blood Alcohol Content Greater than .10 or more [A.R.S. Section 28-1381(A)(2)] is not a lesser offense of Extreme DUI. However, Appellant's arguments must fail when considering the elements of each offense. The elements for each crime are identical with the exception that the crime of Extreme DUI requires an additional element of having a blood alcohol content greater than .18. The test for a lesser included offense was summarized by Judge Erlich in State v. Welch,[3] as:

> An offense is a lesser included offense if it is composed solely of some, but not all, of the elements of the greater offense so that it is impossible to commit the greater offense without also committing the lesser. Put another way, the greater offense contains each element of the lesser offense plus one or more elements not found in the lesser (citations omitted).[4]

When two convictions are based on one act, and one is the lesser included offense of the other, the lesser conviction must be vacated.[5]

For the reason that the appropriate remedy appears to this Court to be to vacate the conviction of Count 4 [Driving with a Blood Alcohol Content Greater than .10, in violation of A.R.S. Section 28-1381(A)(2)], this Court need not address Appellant's multiple (double) punishment argument. Clearly, A.R.S. Section 13-116 is not violated when this Court vacates the conviction for Count 4.

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[2] Id.
[3] Id., 198 Ariz. at 556, 12 P.3d at 231.
[4] Id., citing *State v. Cisneroz*, 190 Ariz. 315, 317, 947 P.2d 889.891 (App.1997).
[5] Id.; State v. *Chabolla-Hinojosa*, 192 Ariz. 360, 965 P.2d 94 (App.1998); *State v. Jones*, 185 Ariz. 403, 916 P.2d 1119 (App.1995).

This Court, therefore, concludes, as did the Court of Appeals in State v. Welch[6] that vacating the conviction of the lesser included offense is the appropriate and correct remedy in this case.

IT IS THEREFORE ORDERED vacating Appellant's conviction for the crime in Count 4, Driving With a Blood Alcohol Content in Excess of .10, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(2).

IT IS FURTHER ORDERED affirming Appellant's convictions and sentences for all of the other charges.

IT IS FURTHER ORDERED remanding this case back to the Mesa City Court for all further and future proceedings in this case.

[6] Supra.